

REMARKS

Favorable reconsideration of this application in light of the following discussion is respectfully requested. Claims 13-14, 16-17, 19-20, 23, 26-28, 31, 34-37, 40, 42-43, 54-90, and 97-128 are pending.

Withdrawal of Rejections

Applicants would like to thank the Examiner for her withdrawal of the rejections of claims based upon Marulich in view of Beyts and further in view of Cole, DeCook and Anderson.

Rejections Based upon Stefandl

The Office continues to reject claims 31, 34-37, 40, 42, 43, 54, 108-112 and 115-126 under 35 U.S.C. § 103(a) as being unpatentable over Stefandl in view of Beyts and further in view of the admitted state of the prior art at paragraph [002] of Applicant's specification or Frank, U.S. Patent No. 5,806,550.

In this final rejection, the Office maintains the rejection of the outstanding claims and dismisses Applicants arguments that the prior art does not teach or suggest the claimed frozen beverage capable of being dispensed from a mechanical dispenser. The Examiner takes the position that "there is no suggestion that the process of the prior art Stefandl in view of Beyts would not be dispensable from a mechanical dispensing device." This rejection is respectfully traversed.

First, Applicants would like to point out that the burden rests with the Examiner to establish a *prima facie* case of obviousness. As part of that burden, the Examiner must establish that it would be obvious to the skilled artisan that the beverage of Stefandl in view of Beyts would be dispensable from a mechanical dispensing device. It is not

Applicants burden to prove the converse that the "prior art does not suggest that it would not."

As previously discussed Stefandl teaches a freezer altering additive for a composition made from a carbohydrate, glycerol or propylene glycol and a sugar alcohol such as sorbitol or erythritol. The freeze altering composition is simply added to a bottle and the bottle is tossed in the freezer to form a slush beverage. Beyts is added for disclosing both the use of a high intensity sweetener in the product and a sugar alcohol as a sweetener. Applicants' specification and Frank have been added to acknowledge that commercial beverage dispensers are known in the art.

Applicants have repeatedly explained that a composition which is capable of freezing under home freezer conditions is not the same as a composition that can be dispensed from a mechanical dispensing device. Nothing within Stefandl or Beyts teaches or suggests that the beverage syrup as disclosed therein is appropriate for dispensing from a mechanical dispenser having a mechanical mixing chamber. The Examiner now takes the position that rather than the Office establishing that it would be obvious to dispense the beverages disclosed by Stefandl or Betys from a mechanical dispenser, Applicants must establish that the prior art suggests that they would not. This improperly shifts the burden to Applicants.

Prior to the present invention, it was not possible to produce a commercially viable beverage in a commercial beverage dispenser. The cited prior art clearly does not establish that it was known or obvious to the skilled artisan. In fact, one skilled in the art would not expect the beverage that could freeze in a home freezer to be appropriate for use in a mechanical mixing device since the freeze conditions are so different. Since the Office has failed to establish a *prima facie* case of obviousness and

since none of Stefandl, Beyts or Frank teach or suggest a beverage capable of being dispensed from a dispenser including a mechanical mixing chamber, withdrawal of this ground of rejection is respectfully requested.

Rejections based on Marulich

The office further rejects claims 13, 14, 20, 23, 28, 31, 37, 54-90, and 106-128 under 35 U.S.C. § 103(a) over Marulich in view of Beyts. The Examiner maintains this rejection for the reasons of record.

Marulich, like Stefandl, is concerned with the production of slush beverages in a home freezer. For all of the reasons of record and those discussed above, there is no suggestion that the beverage of Marulich even as modified by Beyts, would be capable of being dispensed from a mechanical dispenser. Since Marulich, alone or in combination with the other cited references, does not teach a beverage capable of being dispensed from a mechanical dispenser, withdrawal of this ground of rejection is respectfully requested.

Conclusion

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

#55,468

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By: *Jean M. Mar* for _____
Lori-Ann Johnson
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